United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

76-7339

IN THE

United States Court of Appeals

For the Second Circuit

BRITISH AIRWAYS BOARD and
COMPAGNIE NATIONALE AIR FRANCE,
Plaintiffs-Appellees,

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY and WILLIAM J. RONAN, W. PAUL STILLMAN, JAMES G. HELLMUTH, VICTOR R. YANITELLI, ANDREW C. AXTELL, GEORGE F. BERLINGER, MILTON A. GILBERT, ROBERT R. DOUGLAS, JAMES C. KELLOGG, III, GUSTAVE L. LEVY, MATTHEW NIMETZ, ALAN SAGNER,
Defendants-Appellees,

and

TOWN OF HEMPSTEAD, INCORPORATED, VILLAGE OF LAWRENCE, INCORPORATED, VILLAGE OF CEDARHURST, INCORPORATED, VILLAGE OF ATLANTIC BEACH, and ROBERT F. CHECK, MONA GOTTESMAN, and HERBERT WARSHAVSKY,
Applicants for Intervention-Appellants.

On Appeal from Order of United States District Court for the Southern District of New York, Judge Milton Pollack, Denying Appellants' Motion to Intervene

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BRIEF OF APPELLANTS ON APPEAL

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Rule 24. Intervention.

(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) PERMISSIVE INTERVENTION. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) PROCEDURE. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C., §2403. ----------1,2,8,10,12,13,23,24,28

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

BRITISH AIRWAYS BOARD AND COMPAGNIE NATIONALE AIR FRANCE, Plaintiffs-Appellees, v. THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY AND WILLIAM J. RONAN, W. PAUL STILLMAN, JAMES G. HELLMUTH, VICTOR R. YANITELLI, ANDREW C. AXTELL, GEORGE F. BERLINGER, MILTON A. GILBERT, ROBERT R. DOUGLAS, JAMES C. KELLOGG, III, GUSTAVE L. LEVY, MATTHEW NIMETZ, ALAN SAGNER, Defendants-Appellees, TOWN OF HEMPSTEAD, INCORPORATED VILLAGE OF LAWRENCE, INCORPORATED VILLAGE OF CEDARHURST, INCORPORATED VILLAGE OF ATLANTIC BEACH, AND ROBERT F. CHECK, MONA GOTTESMAN, AND HERBERT WARSHAVSKY, Applicants for Intervention-Appellants	Case No. 76-7339

APPLICANTS' BRIEF ON APPEAL

Appellants appeal from an Order of United States District Court for the Southern District of New York, Judge Milton Pollack presiding, denying their motion to intervene pursuant to the provisions of Rule 24(a)(b) of the Federal Rules of Civil Procedure.

References to the Appendix to this Brief are described as A1, A2, A3, etc.

ISSUES PRESENTED FOR REVIEW

1. Is it reversible error for the District Court to deny appellants' motion, pursuant to Rule 24(a)(2) of the FRCP, to intervene on the ground that appellants failed to show that their interests are not adequately represented by the Port Authority, where the record discloses that:

a. The applicants allege in their verified motion that the representation of their interests by the Port Authority may be inadequate (A66-67, A84-A85, A91-A92);

b. The interests of the Port Authority are adverse to and in conflict with those of the Town of Hempstead, et al;

c. The Port Authority is a potential defendant in litigation between the Town of Hempstead, et al. for damages arising from its operation of JFK(A84);

d. The District Court found that, in the pending suit, the Court's decision may immunize the Port Authority from tort liability to applicants in later actions brought by said applicants(A113);

e. The interest of the Port Authority and the interest of the Town of Hempstead, et al are different (A66-A69);

f. The Port Authority will be confronted with a desire to minimize its potential liability and thereby fail to establish the full impact of the operation of the Concorde on the applicants for intervention (A66);

g. The Port Authority has traditionally opposed the interests of the Town of Hempstead, et al., relating to abatement of jet noise (A67); and

h. The Port Authority leases its facilities at JFK to the plaintiff airlines and has a monetary interest in the use of JFK by the airlines (A90)?

2. Is it reversible error for the District Court to deny appellants' motion for permissive intervention on the ground that appellants might be tempted to focus their attention on aspects of the case of greatest concern to them as opposed to the narrow legal questions in issue?

STATEMENT OF THE CASE

This is an appeal from an order entered by Judge Milton Pollack of the United States District Court for the Southern District of New York denying the motions by the Town of Hempstead, three Incorporated Villages, and three residents located in close proximity to John F. Kennedy airport, for leave to intervene in an action brought by the air-

lines, British Airways Board and Air France, for declaratory relief and to enjoin the Port Authority of New York and New Jersey from enforcing its Resolutions prohibiting supersonic jet aircraft, including the Concorde, from using the facilities of JFK until six months operating experience of the Concorde at the Dulles International Airport has been evaluated by it.

The District Court held that the interests of the Town, Villages, and residents were such as to entitle them to intervene in the action, and that a disposition of the pending action will impair or impede the protection of these interests by the Town, Villages and residents (A113). The Court further held that these applicants for intervention "stumbled" with respect to the requirement of adequacy of representation, and denied the motion because: "there is no reason to presume that the Port Authority will not vigorously and conscientiously defend the action which has been brought against it; and there has been no showing by these applicants of (1) collusion, (2) adversity of interests,(3) possible nonfeasance, (4) or incompetence on the part of the Port Authority (A113).

The applicants moved the District Court for a stay of its further proceedings pending their appeal to this court. This motion for a stay was denied. The applicants then moved this Court for a stay or in the alternative to expedite the hearing on the appeal. This was denied. The Court of Appeals considered it to be more appropriate for appellants

to reapply for intervention "for good cause shown" rather than to stay the proceedings.

Relevant Facts

Parties

The plaintiffs-appellees are British Airways Board and Air France, airline operators who wish to operate the Concorde aircraft between Europe and John F. Kennedy airport (JFK). The Concorde is a supersonic jet which was constructed by the plaintiffs and, confessedly, is at least four times as noisey in operation as the loudest subsonic jet in use.

The defendants-appellees are the Port Authority of New York and New Jersey and its commissioners who are engaged in operating JFK. The Port Authority, as the proprietor-operator of JFK, adopted a Resolution which forbade the use of its facilities to supersonic aircraft, including the Concorde, pending the evaluation of the Concorde's operating experience for six months, at Dulles International Airport, by the Port Authority (A41-A42).

The record shows that the Port Authority has, in the past in every instance, opposed the actions of the applicants for intervention to obtain relief from the noise created by the airlines, the tenants of the Port Authority. The cases of American Airlines v. Town of Hempstead 272 F. Supp. 226, Aff'd. 398 F2d 369 (2 Cir. 1968) and Allegheny Airlines v. Village of Cedarhurst, 132 F. Supp. 871, Aff'd 238 F2d 812 (2 Cir. 1956)

loudly attest the zeal of the Port Authority as a traditional antagonist of the Town of Hempstead, et al relating to jet noise. Indeed, out of Court as well as in Court, the Port Authority has worked against the interests of these applicants for intervention in their efforts to abate the jet noise (A84,A90).

The applicants for intervention-appellants are the Town of Hempstead, the Incorporated Villages of Cedarhurst, Lawrence, and Atlantic Beach, and three individuals, Check, Gottesman and Warshavsky, all of whom are located in close proximity to JFK (A52-A59). These appellants will be subjected to injury to their person and damage to their property proximately resulting from the proposed use of JFK by the Concorde aircraft, and the quality of their lives and environment will be adversely impacted severely (A61-A62, A83-A84, A87, A89-A91).

The Pleadings Below

On March 17, 1976, the airlines filed their complaint (A1) seeking a declaration that the Resolution of the Port Authority was invalid as being: (a) contrary to the international obligations of the United States; (b) an unlawful interference with the conduct of the foreign policy of the United States; (c) a burden upon interstate and foreign commerce; (d) an unlawful control of the airways in an area preempted by the federal authority (A2-A32).

On April 6, 1976, the Port Authority filed its answer which, in legal effect, constituted a denial of the material allegations of the complaint (A43-A50).

On May 7, 1976, pursuant to the practice of Judge Milton Pollack of having a conference of the Court and counsel before any motion papers are filed, such a conference was held and counsel for the Town of Hempstead, et al., informed the Court of his clients' desire to intervene as parties defendant in the pending suit (A1). At that time, Judge Pollack informed counsel that he did not favor intervention, and if application is sought for permissive intervention, counsel could consider that such application is denied. Counsel then informed the Court that application would be made to intervene as a matter of right since the Town of Hempstead, et al., satisfy the requirements of Rule 24(a)(2) of the FRCP. The Court instructed counsel to present his papers by June 1, 1976, and to file them with the Court.

On May 19, 1976, the applicants for intervention moved the Court to intervene as parties defendant both as a matter of right and, in the alternative, to intervene permissively (A51-A69). As required by the Rule, the applicants submitted a proposed answer to the Complaint (A70-A80). This answer denied the material allegations of the Complaint, and, in addition, raised defenses based upon estoppel, illegality of administrative

decision, and the reasonableness of the conduct of the Port Authority in the exercise of its proprietary rights as not constituting an unreasonable burden upon interstate and foreign commerce or unreasonable interference with the exercise of the foreign policy of the United States (A74-A80).

The Port Authority did not oppose the applicants' motion to intervene (A93-A95). The plaintiffs each filed an opposition to the motion to intervene (A96-A104).

On July 6, 1976, Judge Pollack denied the applicants' motion to intervene and set forth his reasoning in a Memorandum (A112-A115).

Judge Pollack found that the applicants satisfied the first two requirements of Rule 24(a)(2) in that they "have a strong, palpable interest in avoiding the operation of an aircraft whose take-off noise levels may be considerable more intrusive than those of existing aircraft" (A113), and further that, "the outcome of this suit may well impair the would be intervenors' ability to protect their interest"; in that the court found, "should the airlines prevail, not only would the Concorde be permitted to fly, but this court's decision might immunize the Port Authority from any tort liability in a subsequent action brought by these applicants for intervention". (A113).

Judge Pollack further found, that the applicants stumbled on the adequacy of representation requirement in that, "there is no reason to presume that the Port Authority will not vigorously and conscientiously defend the action which has been brought against it." (A113), and held that inadequacy of representation by existing parties" hinges upon whether there has been a showing of '(1) collusion; (2) adversity of interests; (3) possible nonfeasance; or (4) imcompetence.***No such showing has been made here," (A113) by the applicants.

This constitutes plain error requiring reversal.

ARGUMENT

Point I.

THE DISTRICT COURT ERRED IN FINDING THAT THE APPELLANTS FAILED TO SHOW THAT REPRESENTATION BY THE PORT AUTHORITY WAS INADEQUATE

This error of the District Court can be attributed to its failure to apply the correct measure of proof as established by the cases, to its failure to recognize the conflict and adversity existing between the interests of the Port Authority and those of the applicants for intervention, and their effect upon adequacy of representation.

A.

Inadequacy of Representation Is Satisfied By Showing That Such Representation May Be Inadequate And The Burden Of That Showing Should Be Treated As Minimal

1.

The Supreme Court in Trbovich v. United Mine Workers 404 U.S. 528, 538, (1972) reversed the action of the District Court in denying the motion of a union member to intervene as a matter of right under Rule 24(a)(2)*. The motion to intervene was opposed on the ground that the representation of the union member's interest by the Secretary of Labor, who had instituted the action, was adequate. The Supreme Court held with respect to the Rule 24(a)(2) adequacy of representation requirement, as follows:

> "The requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal."
>
> Foot note 10 page 538 of 404 U.S.

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*Rule 24(a)(2) of Federal Rules of Civil Procedure reads in pertinent part: "When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practicalmatter impair or impede his ability to protect that interest, unless the applicants interest is adequately represented by existing parties".

It is highly significant that the Supreme Court considered that the dual role of the Secretary of Labor in serving as the union member's "lawyer" and the lawyer for the public interest, "may not always dictate precisely the same approach to the conduct of the litigation" - (404 U.S. 539).

2. Adverse Interest

In the case at bar, the District Court found that its disposition of the litigation may "immunize the Port Authority from tort liability" to the appellants in their later litigation (A113). This finding recognizes that the Port Authority will be acting not only in a dual role but also in a role that is antagonistic to and in conflict with the interests of the appellants. This finding also mandates the compelling need for the presence in this litigation of the applicants for intervention in order to prevent the Port Authority from achieving this destruction of the rights of applicants for intervention.

Who is going to oppose such action of the District Court? Certainly, the Port Authority cannot be expected to mount such opposition. Indeed, as alleged in the verified motion to intervene, the Port Authority, in reality, "will be content to obtain any type of decision from this Court that will give them immunity from liability or from legal respon-

sibility to residents of applicants" (A66).

This finding of the District Court (A113) dramatically indicates the conflict of interest existing between appellants and the Port Authority and the crying need for intervention by the Town of Hempstead, et al to protect their interests.

The need for intervention in the case at bar is far more compelling than in the Trbovich case. In Trbovich the Supreme Court considered it sufficient under Rule 24(a)(2) that the intervenor "may have a valid complaint about the performance of 'his lawyer'. Such a complaint ***should be regarded as sufficient to warrant relief in the form of intervention under Rule 24(a)(2)". - 404 U.S. 539.

Judge Pollack found that his disposition of this litigation may destroy rights of appellants against the very parties whom the court holds does adequately represent the appellants. It is inconceivable that adequate representation of applicants can be had from one whose best interest is served by the destruction of applicants. This is not reality.

In Diaz v. Southern Drilling Corp. 427 F2d 118, 1125 (5 Cir. 1970), in a case interpreting the requirements of Rule 24(a)(2) relating to adequacy of representation it was held,

> "***Where the supposed representation actually represents an interest adverse to the intervenor, the representation is obviously not adequate. See Martin V. Kalwar Corp. 5th Cir. 1969, 411 Fed. 552,553".

The Port Authority having an interest which is obviously in conflict with that of the Town of Hempstead, et al, the representation by the Port Authority is totally inadequate.

In Holmes v. Government of the Virgin Islands, et al 61 F.R.D. 3 (Vir. Is. DC 1973) the district court, on the motion to intervene, found that intervenors satisfied, without doubt, the first two requirements of Rule 24(a)(2). So did Judge Pollack in the case at bar.

Judge Young in the Holmes case found that "there is more than an insignificant possibility that the representation of its (Intervenors) position by the government may be inadequate" - 61 F.R.D. 5, and he granted the motion to intervene. The holdings and observations of Judge Young points out that the only contested issue is the "adequacy of representation" requirement. The Court then proceeded to describe the change made in 1966 in Rule 24 and noted,

> "**An important shift in the burden of persuasion took place with the amendment of the Rule in 1966 to read that 'anyone shall be permitted to intervene' when the two 'interest' conditions are met' unless the applicant's interest is adequately represented by existing parties.' Nuesse v. Camp, 128 U.S. App. D.C. 172, 385 F2d 694, 702 (1967); Smuck v. Hobson 132 U.S. App. D.C. 372, 408 F2d 175, 181 (1969)***The language of the new rule suggests that, when the two interest conditions are met, courts should take a liberal approach toward allowing intervention." 61 FRD 4

The Court then went on to recite the holding of the Supreme Court in the Trbovich case (supra), and observed that, "I feel obliged to approach the arguments on this question with at least a slight presumption in favor of intervention. " This is obviously the rule enunciated by the Supreme Court in the Trbovich case.

It is to be recalled that Judge Pollack reasoned that the Town of Hempstead, et al made no "showing of (1) collusion; (2) adversity of interests; (3) possible nonfeasance; or (4) incompetence". (A113). This was the yardstick by which Judge Pollack measured the obligation of the appellants' proofs, and is not authorized by the Supreme Court-Trbovich case.

In the Holmes case, Judge Young, speaking of these four grounds, states that intervenors in that case alleged, "no adversity of interest, non-feasance or neglect or duty, collusion or bad faith" on the part of the government to support inadequacy of its representation. The court then went on to hold,

> "***But the absence of these factors is not decisive in determining adequacy of representation. It is true that the factors mentioned by plaintiff if present, would easily demonstrate that the intervenor was inadequately represented. Stadin v. Union Electric Co., 309 F2d 912, 919 (8 Cir. 1962) cert. denied, 373 U.S. 915, 83 Ct. 1298, 10L. Ed 415 (1963). However, it does not follow that these are the only circumstances that suggest inadequacy of representation".
>
> 61 FRD 4 (emphasis added)

Again, the case at bar is much stronger in requiring intervention than is the Holmes case. The natural interests of the Port Authority in taking advantage of obtaining a favorable defense to the detriment of the applicants for intervention constitutes an interest that is adverse, even though it was not so recognized by the District Court. Judge Pollack erred in failing to recognize this adversity of interests.

3. Divergent Interest

Adequacy of representation is not limited to the proof of collusion, incompetence etc., as held by Judge Pollack, but rather, properly comparing the interest of the Port Authority with that of the Town of Hempstead, et al., and then predicting the course of conduct of the Port Authority in this litigation in the light of its interest, is the proper test.

> As indicated by Judge Young in the Holmes case, "the most important factor in determining adequacy of representation is how the interest of the absentee compares with the interest of the present parties. ***Here, it seems that both parties will seek the same outcome: a determination that the passage of Bill No. 5588 was valid, or at least that the injunction sought would be improper. However, the interest of the intervenors is best characterized as similar, but not identical, to that of the Government. See Ford Motor Co. v. Bisanz Bros. Inc. 249 F2d 22 (8 Cir. 1957)".

So also in the case at bar, the Port Authority and the Town of Hempstead, et al., seek the same outcome, ie., the Resolution of the Port Authority is valid. However, this identity of outcome is not determinative of the question of adequacy of representation. The interest of the Port Authority and the interest of the Town of Hempstead, et al, are different. The Port Authority is seeking to fend off the challenge to its authority and power as an airport operator, while the Town of Hempstead, et al are seeking to protect their quality of life and themselves against injury and damage proximately arising from the operation of the Concorde at JFK.

It is clear from Judge Pollack's opinion that the Court never reached the matter of comparing the interests of the Port Authority with the interests of the Town of Hempstead, et al. Judge Pollack was satisfied to exclude the question of interest of the parties, and determine the matter based on the fact that the parties sought the same outcome. His opinion states,

> "***The Port Authority would appear to have as great an incentive to safeguard the extent of its power from the instant challenge as would any of the proposed intervenors. The motions to intervene as of right must therefore be denied,***."

Thus Judge Pollack's denial of the motions constitutes reversible error in that it is clear from the decided cases that the presence of divergent interests prompting differing tactical approaches in defense of the lawsuit-Trbovich Case (supra) establishes inadequacy of representation justifying intervention. Ford Motor Co. v. Bisanz Bros. Inc. 249 F2d 22, 27-28 (8 Cir. 1957); Kozak v. Wells 278 F2d 104, 108-109 (8 Cir. 1960); Nuesse v. Camp 385 F2d 694,703 (DC Cir. 1967); General Motors v. Burns 50 F.R.D. 401,404-05 (D.C. Haw. 1970); Holmes v. Government of Virgin Islands 61 F.R.D. 3,4-5 (D.C. V. Is. 1973); Hodgson v. United Mine Workers 473 F2d 118 (D.C. Cir. 1972); Wolpe v. Poretsky 144 F2d 505 (D.C. Cir. 1944); Atlantic Refining Co. v. Standard Oil Co. 304 F2d 387; United States v. Reserve Mining Co. 56 F.R.D. 408,415 (D.C.Minn. 1972); and C.Wright and A. Miller, Vol. 7A Federal Practice & Procedure At p. 524.

4. Impact of Divergent Interests On Adequacy of Representation

There are other undisputed facts in the record that bear upon the divergent interests of the Port Authority and of the Town of Hempstead which compel the conclusion that the Port Authorities' representation of the Town of Hempstead, et al., may be inadequate

The Port Authority has traditionally been opposed to the efforts of applicants to obtain relief from jet noise as indicated by two lawsuits: American Airlines, et al., Inc., v. Town of Hempstead 272 F. Supp. 226, Affd. 398 F2d 369 (2 Cir. 1956), and Allegheny Airlines, et al. v. Village of Cedarhurst 132 F. Supps. 871, Aff'd 238 F2d 812 (2 Cir. 1956) in each of these lawsuits the Port Authority actively and vigorously participated as an intervenor - plaintiff against the Town of Hempstead and the Village of Cedarhurst, two of the present applicants.

In addition, the affidavits of applicants Check and Warshavsky allege that the Port Authority has consistently taken the side of the airline operators in connection with said applicants' efforts to obtain relief from the jet noise produced by the aircraft of these Port Authority-lessee-airline operators (Check affidavit A81; Warshavsky affidavit A88).

Furthermore, applicants allege in their verified motion that the Port Authority will be a potential defendant in litigation based upon the operations of the Concorde at JFK (A66,A84). Hence the Port Authority in this litigation will be concerned with its actions in order to minimize its liability in subsequent litigation. This is terribly important because it goes to the interest of the Port Authority in mounting a vigorous defense in all areas.

The complaint raises issues bearing upon the reasonableness or unreasonableness of the challenged conduct of the Port Authority, and in determining whether such action encroaches upon federal authority or is deemed to be a legitimate exercise of the power of a proprietor of a facility, it becomes necessary to balance the impact of such conduct on foreign commerce against the harm that it is preventing. Implicit in this inquiry is an evaluation of the harm that results to the appellants from operation of the Concorde. The more serious the harm sought to be prevented, the more likely the finding of the reasonableness of the questioned conduct of the Port Authority. Bibb v. Navajo Freight Lines 359 U.S. 520 (1959); and Pike v. Bruce Church, Inc. 397 U.S. 132, 142 (1970)in which the Court held, "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effect on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." The Port Authority will, naturally, be timid in this crucial area because of an understandable reluctance to disclose the true picture of the potential injury and damage proximately caused by the operation of the Concorde. The observation of this Court in N.Y. Pub Interest Research Group v. The Regents of

the Univ. of the State of New York. 516 F2d 350 (2 Cir. 1975), is most pertinent. The Court said,

> "***Specifically, we are satisfied that there is a likelihood that the pharmacists will make a more vigorous presentation" of the economic side of the argument than would the Regents."
> p. 352

Certainly, the Town of Hempstead, et al., will make a more vigorous presentation than the Port Authority of the impact of the Concorde's operations on the surrounding communities thus establishing the reasonableness of the Port Authority's challenged conduct. The Town of Hempstead, et al., will not be burdened, in this regard, with fears of establishing the true facts even though it may at the same time show a tremendous damage proximately resulting from the operation of the Concorde at JFK.

The inability of the Port Authority or its unwillingness to make an impressive record disclosing the facts of injury and damage which arise from the operation of the Concorde at JFK which in turn are considered and balanced to ascertain the relation of this local problem to the scheme of foreign policy and its implementation, makes it mandatory that the Town of Hempstead, et al., be permitted to intervene.

In Hodgson v. United Mine Workers 473 F2d 118, 130 (D.C. Cir. 1972) in construing the requirements of Rule 24(a)(2) this court held:

> "The right of intervention conferred by Rule 24 implements the basic juris-prudential assumption that the interest of justice is best served when all parties with a real stake in a controversy are afforded an opportunity to be heard."

When this holding is coupled with the observation of Judge Young in the Holmes case that,

> "***the applicant is the best judge of when representation is adequate and, therefore, that intervention should always be allowed when he is willing to bear the cost of separate representation. There is much to recommend this position.
> 61 FRD 5

it becomes apparent that Judge Pollack committed reversible error in denying appellants' motion to intervene. These appellants have a tremendous stake in the controversy. They are the interested persons in that locale that are directly affected by the operation of the Concorde and have the most to lose (A52-A59). Under the present ruling of the District Court they have no right to be heard as parties in the protection of their interests. They are relegated to having to accept, with grace, that protection afforded by the Port Authority - its traditional antagonist which has a present and immediate

conflicting and adverse interest, the implementation of which would destroy the rights of the applicants for intervention. This is contrary to natural justice. You do not send the fox to guard the hen house.

B. CONCLUSION OF POINT 1

In summary: (a) the interest of the Port Authority in obtaining a decision from the District Court immunizing any liability to the applicants for intervention arising from the operation of the Concorde is in conflict with and adverse to the interests of the applicants for intervention, (b) the tactical similarity of the present legal contentions of the Port Authority and applicants for intervention does not assure adequacy of representation by the Port Authority, or necessarily preclude the applicants for intervention from the opp nity to appear in their own behalf; such consideration, pplied alone as the test for adequacy of reresentation, would have denied intervention in many cases where the court of appeals granted it., ie., the Ford Motor Case, Nuesse case, Holmes case, Diaz case, Atlantic Refining Case, and Kozak case, (all cited above). It is the interpretation of the future conduct of the parties in the light of their respective interests that is important in determining adequacy

of representation; (c) the traditional conduct, in the past decades, of the Port Authority's opposing actions of applicants for intervention relating to the same subject matter of jet noise disqualifies them from representing the applicants for intervention; (d) the divergent interests of the Port Authority (in fending off the challenge to its authority) and that of the applicants for intervention (in seeking to be free from injury and damage from the operation of the Concorde) preclude representation by the Port Authority of applicants for intervention from being adequate; and (e) inadequacy of representation is a minimal requirement that is satisfied by a showing that such representation may be inadequate.

For the foregoing reasons the District Court erred in holding that applicants for intervention did not satisfy the requirement of Rule 24(a)(2) that is representation by the Port Authority may be inadequate.

POINT II

THE DENIAL OF PERMISSIVE INTERVENTION IS AN ABUSE OF DISCRETION REQUIRING REVERSAL

The requirements of Rule 24(b)(2)* of the Federal Rules of Civil Procedure, place upon the applicant the need for showing: (a) timeliness; (b) the claim or defense have questions of law or fact in common with the main action; and (c) that such intervention will not unduly prejudice or delay the adjudication of the rights of the original parties. There is no issue involved concerning adequacy of representation by any of the original parties to the litigation. The motion of the appellants to intervene under Rule 24(b)(2) satisfied all these requirements and its denial by Judge Pollack constitutes reversible error.

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*Rule 24(b) of the Federal Rules of Civil Procedure, relating to permissive intervention, reads in pertinent part:

> "Upon timely application anyone may be permitted to intervene in an action:***(2) when the applicants claim or defense and the main action have a question of law or fact in common***In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties".

A. Timeliness

There can be no doubt that the motion to intervene was timely. It was filed on May 19, 1976 (A1) at a time when no action had been taken in the proceeding other than the filing of the complaint and of the answer. No discovery or motions of any kind were filed on the part of the parties to the proceeding (A1).

B. Common Questions of Law and Fact

The proposed answer of the applicants (A70-A80) follows the pattern of a general denial similar in form to that interposed by the Port Authority. In addition, there are four affirmative defenses (A74-A79) which embrace common issues of law and fact such as preemption, compliance with treaties and agreements, unreasonable burdens upon interstate and foreign commerce, land use management, and estoppel. A reading of the Complaint, the Answer of the Port Authority, and proposed Answers of the applicants clearly establishes the presence of "common question of law or fact" in these three documents.

The complaint has four counts (A9-A30). Involved in the First Count is the question of whether the Congress has preempted the right of an airport operator to control the use

of its airport (A9-A25). The Port Authority and applicants deny such preemption (A44-A46; A71-A73). Count Two alleges a violation of the airlines' rights under various treaties and executive agreements (A22-A24). The Port Authority and applicants deny such allegations (A46, A73). In addition, applicants allege an estoppel against the airlines making such a claim (A74-A76). Count Three alleges an unlawful interference by the Port Authority with the conduct of foreign relations by the United States with Great Britain and France (A24-A29). This is denied by the Port Authority (A46-A47) and by the applicants for intervention (A73). Count IV alleges an unlawful interference by the Port Authority with interstate and foreign commerce (A30). This is denied by the Port Authority (A47) and by the applicants (A73). In addition, the applicants allege that the nature of the problem solved by the conduct of the Port Authority is of a local nature incapable of being legislated by Congress (A76-A78).

C. No Evidence Of Undue Delay Or Prejudice To Parties

It is significant that there is no opposition to the motion to intervene on the part of the Port Authority (A93-A95). Only the airlines have raised an objection (A96, A100).

The District Court denied the motion on strictly surmise and conjecture that, "the applicants for intervention might well be tempted to focus their attention on the aspects of the Concorde's operations of greatest concern to them, as opposed to the narrow legal questions placed in issue by the pleadings in this action" (A114-A115). These speculations are without foundation and can only be explained by the attitude of the District Court when he asserted at a pre-trial conference that he "did not favor intervention". And if appellants were seeking permissive intervention, they "could consider that their motions were denied". At that time and place no motion of any kind had been filed by the appellants.

It is certainly true and needs no argument that the District Court has the power to prevent applicants for intervention from "focus(ing) their attention on aspects of the Concorde's operation of greatest concern to them." If such "attention" or "aspects" are in anyway irrelevant to the "narrow legal questions placed in issue", the District court can and would exercise its judicial power to protect the interests of the litigants and the orderly administration of justice. If on the other hand such matters are relevant and proper they should be considered by the Court before making a determination of the "narrow legal issue". To ignore such relevant matters would constitute a miscarriage of justice

even though a more confined and incomplete record may result by such omission.

To deny the motion to intervene without any basis other than surmise, speculation and predisposition against intervention constitutes an abuse of discretion requiring reversal of the order denying intervention.

In Ionian Shipping Co. v. British Law Ins. Co. 426 F2d 186 (2 Cir. 1970) this Court found that the court below was correct in denying the motion to intervene as a matter of right under Rule 24(a)(2), but it was unfortunate that the applicants for intervention had failed to apply for permissive intervention, to which they were clearly entitled. To the same effect is U.S. v. Local 638 347 F. Supp. 164(SDNY 1972).

It was error for the District Court to deny the motion of the applicants for intervention in said litigation.

CONCLUSION

In a case such as the case at bar involving as it does intense and considerable community interest, allowing intervention will promote public confidence in the administration of justice and in the judicial system. On the other hand, to deny intervention will have a detrimental effect. Particularly is this true when such denial is predicated upon the ground that the interests of the Town of Hempstead, et al are adequately

represented by the Port Authority. That same Port Authority which is identified by word and deed in the minds of the community with being the traditional antagonist of the applicants for intervention relating to matters concerning the abatement or elimination of jet noise.

However fine the web of judicial reasoning may be spun by the District Court to justify the denial of the motion to intervene, the stark fact remains that it is grossly inadequate to overcome the plain, simple and well understood truth that these applicants for intervention with a judically determined stake in the outcome of this litigation are being denied the right to be heard therein because the Port Authority can adequately represent their interest.

Again, you do not send the fox to guard the hen house.

The order denying intervention should be reversed.

Respectfully submitted,

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New York, N.Y.
August 23, 1976

CERTIFICATE OF SERVICE

I hereby certify that on this the 23rd day of August, 1976, service of two copies of Appellants' Brief and one copy of the Appendix on appeal to the United States Court of Appeals for the Second Circuit was made by mailing said copies by first class mail postage prepaid to each of the following counsel of record:

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Service of 2 copies of the within ____ is hereby admitted this ____ day of ____ 19__

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